

87-844

(1)

Supreme Court, U.S.

FILED

OCT 15 1987

JOSEPH F. SPANIO, JR.
CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CHARLES E. SCHMIDT, et al.,

Petitioners,

v.

DON SERPAS, et al.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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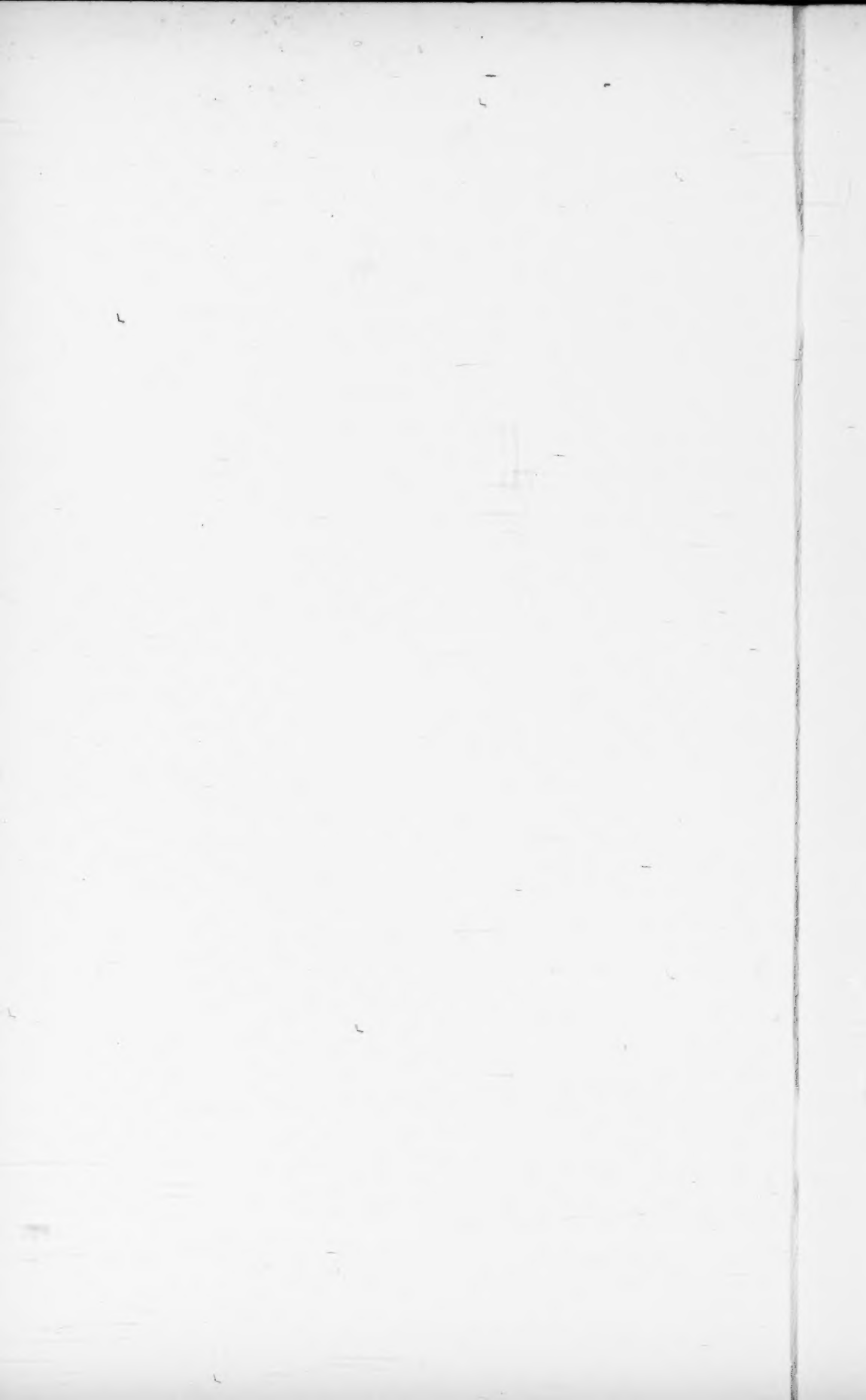
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QUESTIONS PRESENTED

1. Whether Illinois horse racing officials are authorized to conduct warrantless administrative searches under the administrative search exception to the Fourth Amendment of the U.S. Constitution.
2. Whether Illinois horse racing officials are authorized to conduct warrantless, administrative searches even assuming, *arguendo*, that there is no explicit statutory authority for such searches in order to protect the horse racing industry from the threat of drugs and mechanical devices.
3. Whether a federal court should have decided upon the right of Illinois' horse racing officials to conduct warrantless administrative searches based solely upon that court's interpretation of a state statute when this statute has never been interpreted by an Illinois state court and a decision by the state court might have rendered this case moot.

PARTIES

The Petitioners in this Petition, as set forth in the caption as "Charles E. Schmidt, et al.," include Charles Schmidt, Chairman of the Illinois Racing Board; Ray Garrison, Member of the Illinois Racing Board; Thomas Garvey, Member of the Illinois Racing Board; Farrel Griffin, Member of the Illinois Racing Board; Joseph Kellman, Member of the Illinois Racing Board; Cecil Troy, Member of the Illinois Racing Board; Robert Ward, Member of the Illinois Racing Board; James B. Zagel, Director of the Department of Law Enforcement; and certain unknown agents of the Department of Law Enforcement.

The Respondents in this Petition, as set forth in the caption as "Don Serpas, et al.," include Don Serpas, Raymond Johnson and Carl Waters and on behalf of all others similarly situated.

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OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Seventh Circuit was entered on July 17, 1987 and is reported at 827 F.2d 23 (7th Cir. 1987) reprinted herein as Appendix A. The original opinion of the United States Court of Appeals for the Seventh Circuit was entered on December 19, 1986 and is reported at 808 F.2d 601 (7th Cir. 1986). It is reprinted herein as Appendix B. The permanent injunction opinion of the United States District Court for the Northern District of Illinois was entered on July 11, 1985 and is reported at 621 F.Supp. 734 (N.D. Ill. 1985). It is reprinted herein as Appendix C. The preliminary injunction opinion of the United States District

Court for the Northern District of Illinois was entered on June 16, 1983 and has not been reported. It is reprinted herein as Appendix D.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on December 19, 1986. A petition for rehearing with suggestions for rehearing en banc was filed. This petition was denied on July 17, 1987, but an amended opinion was issued the same day. This petition for a Writ of Certiorari is timely filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATION

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ill. Rev. Stat., 1983, ch. 8, §37-1 provides:

37-1. Short title

§ 1. This Act shall be known and may be cited as the "Illinois Horse Racing Act of 1975".

Ill. Rev. Stat., 1983, ch. 8, § 37-2 provides:

37-2. Illinois Racing Board created—Powers and duties—Jurisdiction

§ 2. There is hereby created and established an Illinois Racing Board which shall have the powers and duties specified in this Act, and also the powers necessary and proper to enable it to fully and effectively execute all the provisions and purposes of this Act. The jurisdiction, supervision, powers, and duties of the Board shall extend under this Act to every person, association, corporation, partnership or trust which holds or conducts any meeting within the State of Illinois where horse racing is permitted for any stake, purse or reward.

Ill. Rev. Stat., 1983, ch. 8, § 37-9 provides:

37-9. Powers and duties

§ 9. The Board shall have all powers necessary and proper to fully and effectively execute the provisions of this Act, including, but not limited to, the following:

(a) The Board is vested with jurisdiction and supervision over all race meetings in this State, over all organizations doing business in this State, and all persons on organization grounds. Such jurisdiction shall include the power to issue licenses authorizing the pari-mutuel or certificate system of wagering on harness races held (1) at the Illinois State Fairgrounds in Springfield, and (2) at the DuQuoin State Fair and Fairgrounds in Perry County.

(b) The Board is vested with the full power to promulgate reasonable rules and regulations for the pur-

pose of administering the provisions of this Act and to prescribe reasonable rules, regulations and conditions under which all horse race meetings in the State shall be held and conducted. Such reasonable rules and regulations are to provide for the prevention of practices detrimental to the public interest and for the best interests of horse racing and to impose penalties for violations thereof.

(c) The Board, and any person or persons to whom it delegates this power, is vested with the power to enter the office, horse race track, facilities and other places of business of any organization licensee to determine whether there has been compliance with the provisions of this Act and its rules and regulations.

(d) The Board, and any person or persons to whom it delegates this power, is vested with the authority to investigate alleged violations of the provisions of this Act, its reasonable rules and regulations, orders and final decisions; the Board shall take appropriate disciplinary action against any organization or occupation licensee for violation thereof or institute appropriate legal action for the enforcement thereof.

(e) The Board, and any person or persons to whom it delegates this power, may eject or exclude from any race meeting or organization grounds or any part thereof, any occupation licensee or any other individual whose conduct or reputation is such that his presence on organization grounds may, in the opinion of the Board, call into question the honesty and integrity of horse racing or interfere with the orderly conduct of horse racing; provided, however, that no person shall be excluded or ejected from organization grounds solely on the grounds of race, color, creed, national origin, ancestry, or sex. The power to eject or exclude occupation licensees may be exercised for just cause by the organization licensee or the Board, subject to subsequent hearing by the Board as to the propriety of said exclusion.

(f) The Board is vested with the power to acquire, establish, maintain and operate (or provide by contract to maintain and operate) testing laboratories and related facilities, for the purpose of conducting saliva, blood, urine and other tests on the horses run or to be run in any horse race meeting and to purchase all equipment and supplies deemed necessary or desirable in connection with any such testing laboratories and related facilities and all such tests.

(g) The Board may require that the records, including financial or other statements of any organization licensed under this Act, shall be kept in such manner as prescribed by the Board and that any organization submit to the Board on an annual balance sheet and profit and loss statement and any other information the Board deems necessary in order to effectively administer this Act and all rules, regulations, orders and final decisions promulgated under this Act.

(h) The Board shall name and appoint in the manner provided by the rules and regulations of the Board: a Secretary, a State director of mutuels; State veterinarians and representatives to take saliva, blood, urine and other tests on horses; licensing personnel; revenue inspectors; and State seasonal employees (excluding admission ticket sellers and mutuel clerks). All of those named and appointed as provided in this subsection shall serve during the pleasure of the Board; their compensation shall be determined by the Board and be paid in the same manner as other employees of the Board under this Act.

(i) The Board shall require that there shall be 3 stewards at each horse race meeting, at least 2 of whom shall be named and appointed by the Board. Stewards appointed or approved by the Board, while performing duties required by this Act or by the Board, shall be entitled to the same rights and immunities as granted to Board members and Board employees in Section 10 of this Act.¹

(j) The Board may discharge any State employee who fails or refuses for any reason to comply with the rules and regulations of the Board, or who, in the opinion of the Board, is guilty of fraud, dishonesty or who is proven to be incompetent. The Board shall have no right or power to determine who shall be officers, directors or employees of any organization, or their salaries, except the Board may, by rule, require that all or any officials or employees in charge of or whose duties relate to the actual running of races be approved by the Board.

(k) The Board is vested with the power to appoint delegates to execute any of the powers granted to it under this Section for the purpose of administering this Act and any rules or regulations promulgated in accordance with this Act.

(l) The Board is vested with the power to impose civil penalties of up to \$5,000 against individuals and up to \$10,000 against organizations for each violation of any provision of this Act, any rules adopted by the Board, any order of the Board or any other action which, in the Board's discretion, is a detriment or impediment to horse racing.

¹ Paragraph 37-10 of this chapter.

III: Rev. Stat., 1983, ch. 8, § 37-16 provides:

37-16. Revocation or suspension of occupation license

§ 16. (a) The Board shall, in accordance with Section 15,¹ have the power to revoke or suspend an occupation license, and the steward or judges at a race meeting shall have the power to suspend an occupation license of any horse owner, trainer, harness driver, jockey, agent, apprentice, groom, stable foreman, exercise boy, veterinarian, valet, blacksmith or concessionaire whose work, in whole or in part, is conducted upon race track grounds within the State and owned by race track organizations which have

been granted an organization license by the Board, subject to the procedures outlined in subsections (b) through (e) of this Section. Nothing in this Section shall be construed to permit the Board to deny pari-mutuel clerks, parking attendants, security guards or employees of concessionaires from performing their respective duties upon race track grounds.

¹ Paragraph 37-15 of this chapter.

Ill. Rev. Stat., 1983, ch. 8, § 37-34 provides:

37-34. Endorcement of racing laws—Investigative services

§ 34. (a) The Department of Law Enforcement shall enforce the racing statutes of the State and provide investigative services during all horse racing meetings conducted in this State. Each organizational licensee shall provide and maintain his own security personnel.

(b) Each organization licensee shall submit a request for the investigative services to the Department of Law Enforcement. The Department of Law Enforcement shall determine each organization licensee's pro rata share of the Department's expenses for investigative services rendered to race tracks on a fiscal year basis, and bill each organization licensee for such expenses. Upon receipt of such billing, the organization licensee shall pay the amount billed into the Agricultural Premium Fund. It shall be the duty of the General Assembly in subsequent years to review the operation of the Department of Law Enforcement and make consistent increases or, if the situation necessitates, decreases in the number of personnel necessary in order to fully assure that the Department of Law Enforcement is at such a strength as to effectively carry out the purposes of this Act.

Amended by P.A. 81-207, § 1, eff. Aug. 20, 1979.

Ill. Rev. Stat., 1983, ch. 8, § 37-36 provides:

37-36. Drugs or stimulants—Punishment for administering to horses

§ 36. (a) Whoever administers or conspires to administer to any horse a hypnotic, narcotic, stimulant, depressant or any chemical substance which may affect the speed of a horse at any time, except those chemical substances permitted by ruling of the Board, internally, externally or by hypodermic method in a race or prior thereto, or whoever knowingly enters a horse in any race within a period of 24 hours after any any hypnotic, narcotic, stimulant, depressant or any other chemical substance which may affect the speed of a horse at any time, except those chemical substances permitted by ruling of the Board, has been administered to such horse either internally or externally or by hypodermic method for the purpose of increasing or retarding the speed of such horse shall be guilty of a Class 4 felony. The Board shall suspend or revoke such violator's license.

(b) The term "hypnotic" as used in this Section includes all barbituric acid preparations and derivatives.

(c) The term "narcotic" as used in this Section includes opium and all its alkaloids, salts, preparations and derivatives, cocaine and all its salts, preparations and derivatives and substitutes.

Ill. Rev. Stat., 1983, ch. 8, § 37-37 provides:

37-37. Battery, buzzer or other mechanical appliances—Punishment for using or possession

§ 37. (a) It shall be unlawful for any person:

(1) to use or conspire to use any battery, buzzer, electrical, mechanical or other appliances other than the ordinary whip or spur for the purpose of stimulating or depressing a horse or affecting its speed in a race or workout or at any time; or

(2) to sponge a horse's nostrils or windpipe or use any method injurious or otherwise for the purpose of stimulating or depressing a horse or affecting its speed in a race or a workout at any time; or

(3) to have in his possession within the confines of a race track, stables, sheds, buildings or grounds, or within the confines of a stable, shed, building or ground where horses are kept which are eligible to race over a race track of any racing association or licensee, any appliance other than the ordinary whip or spur which may or can be used for the purpose of stimulating or depressing a horse or affecting its speed at any time; or

(4) to have in his possession with the intent to sell, give away or exchange any of such instrumentalities.

(b) Such possession of such instrumentalities by anyone within the confines of a race track, stables, sheds, buildings or grounds where horses are kept which are eligible to race over the race tracks of any racing association or licensee shall be prima facie evidence of intention to so use such instrumentalities.

(c) Any persons who violate this Section shall be guilty of a Class 4 felony. The Board shall suspend or revoke such violator's license.

III. Rev. Stat., 1983, ch. 8, § 37-39 provides:

37-39. Unlawful corrupt acts or practices

§ 39. (a) It shall be unlawful for any person to engage directly or indirectly or for any person to conspire with or to aid, assist or abet any other person in the engagement or commission of any corrupt act or practice, including, but not limited to:

(1) the giving or offering or promising to give, directly or indirectly, a bribe in any form to any person having official duties in relation to any race or race horse or to any trainer, jockey or agent or to

any other person having charge of, or access to, any race horse;

(2) the passing or attempting to pass or the cashing or attempting to cash any altered or fraudulent mutuel ticket;

(3) the unauthorized sale or the attempt to make an unauthorized sale of any race track admission ticket.

(b) Any person who violates this Section is guilty of a Class 4 felony.

(c) If any person who violates this Section is licensed under this Act, the Board shall suspend or revoke the organization or occupation license in addition to the penalty and fine imposed in subsection (b).

Thoroughbred Rule 322 and Harness Racing Rule 25.19 provide:

INSPECTIONS AND SEARCHES

a. The Illinois Racing Board or the state steward investigating for violations of law or the Rules and Regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said Board; and of all vendors who are permitted by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive and release all claims

or possible actions for damages that he may have by virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment, and each vendor who is permitted to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule may have his license suspended or revoked.

b. The Illinois Racing Board delegates the authority to conduct inspections and searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees of the Department of Law Enforcement assigned, from time to time, to assist the Chief Investigator in his duties.

STATEMENT OF THE CASE

STATUTORY FRAMEWORK

The Illinois Racing Board (IRB) is empowered under the Illinois Horse Racing Act of 1975 (hereinafter, "the Act") to regulate horse racing in the State of Illinois. Ill. Rev. Stat. 1983, Ch. 8, §37-1 *et seq.* It is given "the powers necessary and proper to enable it to fully and effectively execute all the provisions of this Act." *Id.*, §37-2. The IRB is empowered to promulgate reasonable rules and regulations "to provide for the prevention of practices detrimental to the public interest and for the best interests of horse racing . . ." *Id.*, §37-9(b). It is vested with jurisdiction and supervision over all organizations doing business in the State of Illinois, and all persons on race track grounds. *Id.*, §37-9(a).

The Board or its designee is also empowered to investigate any alleged violations of the Act and any violations of the Board's rules and regulations. The Illinois Department of Law Enforcement (DLE) was designated by the Illinois Legislature to "enforce the racing statutes of the State and provide investigative services during all horse racing meetings conducted in this State." *Id.*, §37-34. Among the disciplinary powers accorded the Board are the powers to suspend or revoke licenses, to eject or exclude from Illinois race tracks any person whose reputation or conduct calls into question the honesty and integrity of horse racing and to assess civil penalties. Ill. Rev. Stat. 1983, Ch. 8, §§37-9, 37-16.

The Act prohibits administration of any drug to a horse which may affect the speed of a horse. Ill. Rev. Stat. 1983, Ch. 8, §37-36. It is illegal for a licensee to possess, use or conspire to use a battery, buzzer or other appliance. Ill. Rev. Stat. 1983, Ch. 8, §37-37. The Act prohibits the bribing of any individual having charge of, or access to any race track. Ill. Rev. Stat. 1983, Ch. 8, §37-39.

Two identical IRB rules ("the rules") formed the basis of respondents' challenge in the United States District Court. They are Thoroughbred Rule 322 and Harness Rule 25.19. These rules permit searches of IRB licensees and of all rooms within the race track enclosure by the IRB, its stewards or DLE agents. They also provide that any licensee employed within a race track enclosure consents to such searches by virtue of his or her employment.

Section 9(c) of the Act provides:

The Board, and any person to whom it delegates this power, is vested with the power to enter the office, horse race track, facilities and other places of business of any organization licensee to determine whether there has been compliance with the provisions of this

Act and its rules and regulations. Ill. Rev. Stat. 1983, Ch. 8, §37-9(c).

Illinois courts have never interpreted this section.

UNITED STATES DISTRICT COURT LITIGATION

Respondents brought this action on behalf of all exercise persons, grooms and hot walkers ("backstretchers") employed at Illinois race tracks. They challenged warrantless searches conducted by respondent DLE agents of their assigned living cubicles. These cubicles, located within the race track enclosure, were assigned by trainers for whom the backstretchers worked and could only be used by backstretchers while they were employed on the race track. There was no requirement that backstretchers had to live on the track. Respondents also challenged investigatory stops and searches of their persons. Respondents also challenged the Board's policy of only issuing respondents' licenses upon their consent to be searched. Respondents claimed the rules violated their Fourth Amendment rights under the United States Constitution. Petitioners argued that the statute did authorize warrantless searches. They also asserted that the searches were reasonable since horse racing was subject to pervasive and long-standing regulation.

After first entering a preliminary injunction on June 16, 1983, the United States District Court permanently enjoined petitioners from enforcing the rules on July 11, 1985. The United States District Court found that Section 9(c) of the Act did not provide petitioners with authority to conduct the searches and that the administrative searches of respondents' persons and of their living cubicles located within the race track enclosure could not be conducted absent such statutory authority. In addition, the Court found that the administrative search ex-

ception did not apply to searches of respondents' living cubicles or searches of their person. Under the Court's reasoning, the rules violated respondents' Fourth Amendment rights. It enjoined petitioners from searching respondents' cubicles, from searching respondents, conducting investigatory stops of respondents or conditioning the issuance of their occupation license upon their consent to such searches.

UNITED STATES COURT OF APPEALS LITIGATION

Petitioners filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit on August 9, 1985. On December 19, 1986, the Court of Appeals for the Seventh Circuit affirmed the lower court's judgment with one judge dissenting.

The majority found that respondents were without statutory authority to conduct the challenged warrantless searches and that no administrative searches could be conducted without such statutory authority. The majority also found the regulatory scheme wanting because it was not sufficiently certain and regular and therefore did not comport with Fourth Amendment reasonableness requirements. After raising the issue of abstention, *sua sponte*, at oral argument, the majority of the panel refused to abstain or to certify the question to the Supreme Court of Illinois even though its entire decision revolved around the interpretation of a state statute and implicated questions of local police powers involving the State's right to regulate horse racing. In a spirited dissent, Judge Eschbach found that the Court should have abstained because the only matter that was before the Court was the interpretation of Section 9(c) of the Act and this question should have first been disposed of by the state courts.

On January 30, 1987, petitioners filed a Petition for Rehearing with Suggestion for Rehearing En Banc. On July 17, 1987, in an amended opinion, a majority of the panel voted to deny the petition for rehearing. Judges Bauer, Cummings, Cudahy, Flaum, Ripple, and Kanne voted to deny the petition for rehearing en banc. Judges Posner, Coffey, Easterbrook and Manion voted to grant rehearing en banc. Senior Circuit Judge Eschbach joined them in voting to grant the rehearing en banc.

Judge Easterbrook wrote the dissent (hereinafter sometimes referred to as "the dissent") from the denial of rehearing en banc, joined by Judges Posner, Coffey and Manion as well as Senior Circuit Judge Eschbach. Judge Easterbrook emphasized the significance of the case. He pointed out that the "panel's approach to the interpretation of state laws could govern many cases, as would its handling of consent." *Serpas v. Schmidt*, 827 F.2d 35 (7th Cir. 1987). Important principles established by the panel will have lasting effect and deserve more attention according to the dissent. The dissent pointed out that the panel's decision was based entirely on an interpretation of a state statute. Under well-settled principles of comity and federalism, the panel should not have utilized an interpretation of state law as its basis of decision. Its holding that warrantless searches may not be carried out without statutory authority creates a dangerous precedent since it imposes a requirement on state law enforcement efforts which nowhere else exists. The panel's holding on respondents' consent "eliminates consent as a ground for search." *Id.* 827 F.2d at 38.

REASONS FOR GRANTING THE WRIT

I.

ILLINOIS HORSE RACING OFFICIALS ARE AUTHORIZED TO CONDUCT WARRANTLESS ADMINISTRATIVE SEARCHES OF ALL RACE TRACK PREMISES AND HORSE RACING LICENSEES UNDER THE ADMINISTRATIVE SEARCH EXCEPTION TO THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In industries subject to long-standing and pervasive government regulations, this Court has sanctioned searches without warrants. *Colonnade Catering Corporation v. United States*, 397 U.S. 72, 78 (1970); *United States v. Biswell*, 406 U.S. 311, 316 (1982). The reason warrantless searches are permitted in such industries is that searches are a "crucial part of the regulatory scheme." *Biswell*, 406 U.S. at 315-316. This Court has found that the public interest in strong regulation of such industries justifies creating an exception to the Fourth Amendment. "... [I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent inspections are essential." *Id.* 406 U.S. 316. Such rationale justifies the rules here at issue.

The Seventh Circuit and respondents agree that the state has a paramount interest in regulating the sport of horse racing. This Court has recognized the vital state interest involved in horse racing. *Barry v. Barchi*, 443 U.S. 55 (1979). No one contests the fact that the sport of horse racing has been historically pervasively regulated. The Seventh Circuit, however, held that the regulatory scheme utilized by respondents did not contain the requisite certainty and regularity to adequately substitute for a warrant. Such a ruling is in direct conflict with the

most recent administrative search case decided by this Court.

In *New York v. Burger*, ____ U.S. ____, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987), this Court upheld a warrantless search of a junkyard by police officers in a situation fraught with criminal overtones. Although the Court stated that the “time, place and scope” of the inspection was limited, a close examination of this Court’s opinion shows that it was not any more limited than the regulatory scheme in the instant case. There was no particular reason respondent’s junkyard was selected for inspection. *Id.* 96 L.Ed.2d 609, n.2. There was no limit to the number of searches that could be conducted during any given period. 96 L.Ed.2d 619, n.21. Vehicle dismantlers were placed on notice prior to searches through the statute. Searches could be conducted during regular business hours of records and vehicles or parts of vehicles which were subject to record keeping. *Id.*

Here backstretchers were placed on notice of the searches through the pervasive regulatory scheme, through Section 9(c) of the Act, through the rules which were appended to their license application and through the requirement that they consent to the searches. The rules indicated who would perform the searches, who would be searched and the areas that could be searched. Since horse racing activity goes on almost continuously on the backstretch, the regular and usual business hours of horse racing are different than those of other businesses.

The basis for upholding searches in *Burger* also sustains searches in the instant case. In both cases, the “regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspec-

tions undertaken for specific purposes." *Id.*, 96 L.Ed.2d 615-16, n.16, citing *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). Due to the unique nature of horse racing, petitioners submit that searches of the commercial living cubicles and the persons of licensees can also be searched.

The Seventh Circuit rejected the argument that respondents impliedly consented to the searches by voluntarily and knowingly entering the pervasively regulated field of horse racing. The dissent points out that in any situation where a person is subject to a governmental regulation, he faces a choice. He either must accede to the regulation or relinquish the benefit he is seeking to assert. Courts have imposed such requirements for individuals who wish to travel. [*United States v. Davis*, 482 F.2d 893 (9th Cir. 1973)] or to work [*Snepp v. United States*, 444 U.S. 507 (1980)]. There is no reason why it should not be imposed on individuals who wish to engage in the sport of horse racing. "[T]he state may use the consent even if it may not act over objection." *Serpas v. Schmidt*, 827 F.2d 23 (7th Cir. 1987) (Easterbrook, J., dissenting).

II.

ILLINOIS HORSE RACING OFFICIALS ARE AUTHORIZED TO CONDUCT WARRANTLESS, ADMINISTRATIVE SEARCHES EVEN ASSUMING, *ARGUENDO*, THAT THERE IS NO EXPLICIT STATUTORY AUTHORITY FOR SUCH SEARCHES IN ORDER TO PROTECT THE HORSE RACING INDUSTRY FROM THE THREATS OF DRUGS AND MECHANICAL DEVICES.

The Seventh Circuit reached its decision to affirm the District Court's entry of a permanent injunction based upon the principle that a governmental agency cannot conduct warrantless administrative searches without explicit statutory authority. Here petitioners have put forth ex-

PLICIT statutory authority to sanction administrative warrantless searches carried out by them. There is no statutory prerequisite, however, for a valid administrative or inventory search. Such a holding by the Seventh Circuit conflicts directly with previous opinions rendered by this Court and other Circuits. By ruling that respondents must have specific statutory authority to conduct the searches, the Seventh Circuit has cut away a significant amount of respondents' state police power and authority to regulate horse racing. It has also established a precedent under which all types of legitimate law enforcement activities can be attacked when there is no explicit statutory authority to carry out the activity.

Section 9(c) of the Act empowers the Board or any person to whom it delegates the power to enter the office, horse race track, facilities and other places of business of any organization licensee. The Seventh Circuit found that the living quarters of respondents were not within the scope of the statute, were therefore excluded from the statute and could not be searched. As Judge Easterbrook's dissent noted, the premises where backstretchers stay while working on the track are *part* of the race track facilities and promote the operation of the racing business. Track premises are owned by the race track which make them available to trainers as an accommodation while racing is going on at the race track. Trainers assign the rooms to backstretchers at no charge. Since backstretchers tend to the horses from early in the morning until late at night, it is for the benefit of the race track and its licensees that backstretchers stay in the cubicles. Judge Easterbrook pointed out that:

[T]he backstretchers may regard the cubicles as residences, but the licensees regard them as part of the track complex. . . . Papers suggesting improprieties

may be hidden anywhere the licensee may be found; drugs given to horses may be hidden at the track and elsewhere. It would be most surprising if the Board may not inspect at least every corner of the race track proper for drugs, forbidden implements, and suspicious papers. Yet under the panel's decision, the licensee can put part of the track off limits by the expedient of inviting an employee to sleep there. 827 F.2d at 37.

The dissent is compelling that respondents have statutory authority to conduct warrantless searches anywhere within the race track enclosure.

The opinion of the Seventh Circuit in this case clearly conflicts with previous Supreme Court decisions where this Court sustained administrative searches without any statutory authorization. In *Colorado v. Bertine*, ____ U.S. ____, 107 S.Ct. 738 (1987), this Court found that a police officer could open a closed backpack found in a van after the owner had been removed from the scene. This Court found such an inventory search reasonable even though it was not conducted pursuant to a warrant based upon probable cause. No statutory provision gave police officers the authority to conduct the inventory search; it was based strictly upon police department procedures which this Court found sufficient to create a well-defined exception to the warrant requirement of the Fourth Amendment.

Other Circuits have also upheld administrative searches absent explicit statutory authority. In the area of horse racing, the Third Circuit upheld a jockey drug urine testing program of the New Jersey Racing Commission as reasonable and not violative of the Fourth Amendment. There was no statutory authority for the program. *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir. 1986), cert.

denied, ____ U.S. ____, 107 S.Ct. 577 (1986). In *McDonell, et al. v. Hunter, et al.*, 809 F.2d 1302 (8th Cir. 1987), the Eighth Circuit upheld a urinalysis program for prison employees who had regular contact with prisoners. The court also upheld systematic random searches of employees' cars located within the prison grounds accessible to inmates. This was based strictly upon Iowa Department of Corrections policy as written in the employee's manual and not upon any statutory authority. In *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), the Fifth Circuit upheld the constitutionality of a drug testing program that analyzed urine of Customs Service employees who sought promotion into certain positions. The testing program was based upon an Executive Order and not upon any statute.

There is a clear conflict between the opinion of the Seventh Circuit Court of Appeals and other Circuits on the vital question of the necessity of a statutory prerequisite to conduct administrative searches. Legitimate regulatory powers exercised by the State are now subject to attack because no specific statutory authority may exist for such powers. Vacation of the Seventh Circuit decision is therefore crucial if the state is to maintain effective law enforcement powers.

III.

THE SEVENTH CIRCUIT SHOULD HAVE ABSTAINED FROM DECIDING THIS CASE SINCE ITS DECISION WAS BASED SOLELY ON ITS INTERPRETATION OF A STATE STATUTE.

Most remarkable about the Seventh Circuit's opinion is that a federal court reached its decision by interpreting Section 9(c)—a state statute—which had never been interpreted previously by an Illinois court. Its decision was

reached without any reliance on any constitutional provision or federal question. In engaging in this process rather than abstaining and deferring to Illinois courts for an interpretation of the statute, the Seventh Circuit has ignored vital principles of comity and federalism and has vitiated any distinction between the powers of the states and the federal government. The dissent points out that the Seventh Circuit refused to give any deference to the State in interpreting the State's statutes. Such an approach blurs any distinction between suits that may be brought in state courts and suits that may be brought in federal courts.

In *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 500-501 (1941), this Court established the principle that the "last word on the statutory authority" of a state agency belonged to state courts. In order to avoid "needless friction with state policies" and to maintain "scrupulous regard for the rightful independence of the federal judiciary," Justice Frankfurter held that the Supreme Court should stay its hand and permit the state courts to decide the question. 312 U.S. at 500-501. In so ruling, Justice Frankfurter reasoned:

Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. *Id.* at 501.

This abstention doctrine has become entrenched in American jurisprudence and has most recently been strongly reaffirmed by this Court in *Pennzoil Company v. Texaco*, ___ U.S. ___, 107 S.Ct. 1519 (1987), citing *Moore v. Sims*, 442 U.S. 415, 428 (1979). There this Court stated:

When federal courts interpret state statutes in a way that raised federal constitutional questions, "a consti-

tutional determination is predicated on a reading that is not binding on state courts and may be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless. 107 S.Ct. 1526.

It is significant that the Seventh Circuit did not even address constitutional issues. It merely determined whether Section 9(c) permits warrantless searches of licensees. This is an advisory opinion not binding on state courts.

When a state statute can be construed in such a manner that a determination by the state court will avoid or substantially modify the constitutional question presented, abstention is required. *Babbitt v. United Farm Workers National Union, et al.*, 442 U.S. 289, 306 (1979). This has even been previously recognized by the Seventh Circuit itself in *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983) where the Court stated that “only a state court can authoritatively interpret its own state’s statutes and ordinances.” 723 F.2d at 1352. Here a state court interpretation of Section 9(c) could have easily modified or eliminated the federal question involved and avoided federal jurisdiction. The state court might have ruled, for example, that the IRB was not delegated the power to promulgate the rules. This would have rendered the entire case moot.

A second basis for abstention in this case is provided by *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In that case, Justice Hugo Black held that the federal courts should not interfere in an area of vital local concern involving the state’s basic policy. If the federal review of the question “would be disruptive of state efforts to establish a coherent policy with respect to matter of substantial concern,” then abstention is appropriate. *Colorado River Water Conservation District v. United States*, 424

U.S. 800, 814 (1976). Regulation of horse racing is precisely such an area of local concern. It implicates basic police powers which under the U.S. Constitution are delegated to the states. In interpreting Section 9(c), the Seventh Circuit has enmeshed itself in a matter of local concern, created unnecessary friction in federal-state relations and rendered an advisory opinion on a state statute. Precedent established by this Court bars such a result.

An alternative to abstention which could have been taken by the Seventh Circuit, which it rejected was to certify the meaning of Section 9(c) to the Illinois Supreme Court. Such a procedure would have answered the uncertain question of state law and avoided delay and unnecessary expense. This Court has approved of such a procedure and certification should have been ordered in this case in the absence of abstention. *Houston v. Hill*, ____ U.S. ____, 107 S.Ct. 2502, 2512-15 (1987).

In failing to abstain in this case, the Seventh Circuit has severely interfered with the state's regulatory powers and law enforcement authority. It has interfered with important state policies by providing an extremely limiting construction of a state statute. This Court should decide this question so that the state's right to carry out its lawful police powers without federal interference may be reaffirmed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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